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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIBERGLASS SPECIALTY COMPANY, INC.,
Petitioner,

v.

BOR-SON CONSTRUCTION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals may overturn a decision on the ground that the Bankruptcy Court lacked summary jurisdiction of the case, where neither party has raised the issue.

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HISTORY OF THE CASE

The District Court of the United States, District of Minnesota, Third Division in Bankruptcy, No. 3-78-367(D)—Verdict for Fiberglass Specialty Company, Inc.

The United States District Court, District of Minnesota, Fourth Division, No. 4-80-315—Affirmed.

The United States Court of Appeals for the Eighth Circuit, No. 81-1647—Reversed and Remanded to the District with direction to Vacate the Order of the Bankruptcy Court for lack of jurisdiction.

STATEMENT OF JURISDICTION

Judgment entered by the Eighth Circuit Court of Appeals—May 19, 1982.

Re-hearing denied—June 21, 1981.

This Petition is submitted pursuant to the jurisdiction of the Supreme Court under 29 U.S.C. §1254.

APPLICABLE STATUTES AND RULES

11 U.S.C. §46 (Bankruptcy Act §23)

Jurisdiction of United States and State Courts . . . . b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

Fed. R. Civ. P. 12(g)

Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Bankruptcy Rule §2

Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

. . . . (7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction.

Bankruptcy Rule 915

Objection to Jurisdiction of Court of Bankruptcy

(a) Waiver of Objection to Jurisdiction. Except as provided in Rule 112 and subject to rule 928, a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

On August 11, 1975, Bor-Son Construction, Inc. (hereinafter referred to as "Bor-Son") hired Fiberglass Specialty Company, Inc. (hereinafter referred to as "Fiberglass") to design, manufacture, and install circular tank covers for the Estherville, Iowa Water Treatment Facility (hereinafter referred to as "the Estherville Project"). Fiberglass distributed most of its work among several subcontractors.

When Fiberglass completed its work on the Estherville Project in November of 1977, Bor-Son was indebted to Fiberglass for $66,191.31. Bor-Son refused to pay its debt until Fiberglass supplied lien waivers from all subcontractors who worked on the Estherville Project. Four subcontractors refused to sign waivers, and Bor-Son continued to withhold the final payment.

On March 28, 1978, Fiberglass filed for an Arrangement under Chapter XI of Bankruptcy Act. On April 3, 1978, the Bankruptcy Court entered its order authorizing Fiberglass to remain in possession of its properties, business, and affairs, and enjoining and restraining all persons from proceeding against it or any of its properties until further order by the Court (Appendix, p. A-1). On May 18, 1978, Fiberglass contacted Bor-Son by letter, demanding payment for its work on the Estherville Project and informing Bor-Son of the pending Chapter XI proceedings. In a letter dated August 4, 1978, Fiberglass informed the Estherville City Council of the Chapter XI proceedings and of the necessity that all monies due Fiberglass and its subcontractors be paid into the Bankruptcy Court. A copy of this letter was sent to and received by Bor-Son. On September 18, 1978, Fiberglass commenced

an action in Bankruptcy Court to recover the $66,191.81 retained by Bor-Son. Bor-Son answered the Summons and Complaint and filed a counterclaim. Bor-Son subsequently paid off all the claimants who had filed liens against the Estherville Project, a total amount of $62,112.72; this payment was made without the permission of the Bankruptcy Court and without the consent of Fiberglass. Bor-Son then filed a claim in the amount of $66,184.12 in connection with Fiberglass' Chapter XI proceedings.

All actions concerning the Estherville Project were consolidated for trial. The case was heard by the U.S. District Court for the District of Minnesota, Third Division in Bankruptcy, without objection to jurisdiction by either party. Fiberglass agreed to reduce its claim by $18,181.13, which was the amount due on valid subcontractor claims. The Bankruptcy Court reduced the balance by an additional $16,572.00 for breach of contract damages. The Bankruptcy Court found that the remaining amount was unjustly withheld from Fiberglass by Bor-Son, and ordered judgment against Bor-Son for $31,488.18, plus accrued interest.

Bor-Son appealed the order to the District Court and the matter was brought before the U.S. Magistrate pursuant to 28 U.S.C. §636(c). Neither side challenged the Bankruptcy Court's jurisdiction, and the U.S. Magistrate affirmed the order of the Bankruptcy Court in all respects.

Bor-Son then appealed the decision to the United States Court of Appeals for the Eighth Circuit. Although Bor-Son did not contest the Bankruptcy Court's jurisdiction, the Court of Appeals reversed the District Court on the ground that the Bankruptcy Court could not assert summary jurisdiction over a res in which the debtor did not have a property interest. The Court of Appeals declined to address the substantive issues

and remanded the case to the District Court with direction to vacate the judgment. Fiberglass filed a Petition for Rehearing by Panel of the Eighth Circuit, which was denied on June 21, 1982.

Fiberglass now comes before the Supreme Court of the United States, asking the Court to grant certiorari to determine whether the Court of Appeals correctly ruled that the Bankruptcy Court did not have summary jurisdiction over the case, even though neither party to the action objected to the summary jurisdiction of the Bankruptcy Court.

ARGUMENT

I. The Bankruptcy Court Had Subject Matter Jurisdiction to Hear the Case.

Since the Court of Appeals did not so specify, it is important to emphasize that its holding was based upon the *summary* jurisdiction of the Bankruptcy Court. The Bankruptcy Court clearly had subject matter jurisdiction of the case under Bankruptcy Rule 2a(7), which permits the courts of bankruptcy to "Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto . . . ." The case at bar is a controversy related to the Fiberglass estate; therefore, Rule 2a(7) conferred subject matter jurisdiction upon the Bankruptcy Court for the District of Minnesota to hear the case.

The distinction between summary jurisdiction and subject matter jurisdiction has been carefully defined in the case of *Lilienstein v. Carberry (In Re Murray)*, 82 F.2d 612 (7th Cir. 1937). Murray, a bankrupt farmer, sued in Bankruptcy Court for the return of land which one of his creditors had taken. The creditor filed an Answer, but did not challenge the

jurisdiction of the Bankruptcy Court at that time. The case proceeded on its merits, and a verdict was entered for the bankrupt. The creditor appealed, claiming that the Bankruptcy Court lacked summary jurisdiction because the action involved property which was not in the hands of the bankrupt.

The Court of Appeals upheld the jurisdiction of the Bankruptcy Court. "Having jurisdiction of the subject-matter in a plenary suit, the objection to proceeding summarily may be waived by the adverse party by an answer amounting in law to consent to the procedure. In other words, the objection to summary procedure does not go to the jurisdiction of the subject-matter but to the jurisdiction to proceed in a summary way. *This clearly may be waived.*" 92 F.2d at 614 (emphasis supplied).

The rationale and cases used by the Court of Appeals also indicate that it was addressing summary jurisdiction, not subject matter jurisdiction. The argument made by the Court, that a bankruptcy court has jurisdiction only over property which is in the actual or constructive possession of the debtor, is a primary issue in disputes over summary jurisdiction. See, e.g., *Harrison v. Chamberlin*, 271 U.S. 191, 46 S.Ct. 467, 70 L. Ed. 897 (1926). Additionally, every case cited by the Court of Appeals concerned summary jurisdiction, not subject matter jurisdiction. It is therefore apparent that the Court of Appeals denied only the Bankruptcy Court's summary jurisdiction, not its subject matter jurisdiction.

The Bankruptcy Court's subject matter jurisdiction was clearly granted by Rule 2a(7), and the Court of Appeals' opinion did not in any way dispute the subject matter jurisdiction of the Bankruptcy Court over the case, but challenged only the Bankruptcy Court's summary jurisdiction. Accordingly, the sole issue presented to the Supreme Court is whether

the Bankruptcy Court had summary jurisdiction over the case.

II. Parties to an Action May Waive Their Right to a Plenary Suit, and Consent to the Summary Jurisdiction of the Bankruptcy Court.

The Court of Appeals determined that the Bankruptcy Court did not have summary jurisdiction because Fiberglass did not hold an undisputed property interest in the money retained by Bor-Son. Ordinarily, the position taken by the Court of Appeals would be correct. However, statutory and case law provide that when a claimant waives its right to a plenary suit, the Bankruptcy Court may take jurisdiction of the case.

Congress has declared that a Defendant may consent to the Bankruptcy Court's summary jurisdiction. "Suits by the receiver and the trustee shall be brought or prosecuted only in the Courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, *unless by the consent of the Defendant* . . . ." 11 U.S.C. §46(b) (Bankruptcy Act §23(b)) (emphasis supplied). By enacting this provision, Congress established the consent of a defendant in a suit to recover property outside the Bankruptcy Court's possession as a ground for federal jurisdiction. *Coffman v. Cobra Manufacturing Company*, 214 F.2d 489, 491 (9th Cir. 1954). Courts have uniformly upheld bankruptcy court's summary jurisdiction under Section 23(b), as shown by *MacDonald v. Plymouth Trust Company*, 286 U.S. 263, 52 S.Ct. 505, 76 L. Ed. 1093 (1932): "We can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit, secured to suitors under Section 60(b) and

Section 23(b), may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted." 286 U.S. at 267.

Thus, a Bankruptcy Court has summary jurisdiction with respect to property not within its actual or constructive possession, if the Defendant consents to its jurisdiction. *Lindsey-Robinson & Company v. Grady*, 282 F.2d 607 (4th Cir. 1960). There is no doubt that the right to have issues tried in a plenary suit is procedural only, and may be waived by the parties. *Harris v. Avery Brundage Company*, 305 U.S. 164, 59 S.Ct. 131, 83 L. Ed. 100 (1938); *United States v. Davies (In re Read-York, Inc.)*, 152 F.2d 313, 315 (7th Cir. 1945); *Cuvrell v. Mazur (In re F & T Contractors, Inc.)*, 649 F.2d 1229, 1233 (6th Cir. 1981).

Petitioner's argument is further supported by *Harrison v. Chamberlin*, 271 U.S. 191, 46 S.Ct. 467, 70 L. Ed. 897 (1926), a case cited by the Eighth Circuit Court of Appeals in the instant case. In *Chamberlin*, the Supreme Court held that the Bankruptcy Court lacked jurisdiction, but only after ascertaining that the Respondent had not consented to the summary jurisdiction of the Bankruptcy Court. Justice Sanford, speaking for a unanimous Supreme Court, stated, "It is well settled that a Court of Bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to the property held adversely to the bankrupt estate, *without the consent of the adverse claimant*. . . . As the Respondent's objection to summary jurisdiction of the Bankruptcy Court was well taken, *and there was no waiver of her right in this respect*, (citations omitted) the decree of the Circuit Court of Appeals is affirmed." 271 U.S. at 193, 195 (emphasis supplied).

The cases relied upon by the Court of Appeals recognize that a Defendant may consent to summary jurisdiction. "When possession is held by a third person, adverse claims may not be summarily adjudicated *unless by consent*, or unless the claim is merely colorable." *Bayview Estates, Inc. v. Bayview Estates Mobile Homeowners Association*, 508 F.2d 405, 408 (3rd Cir. 1964) (emphasis supplied). "Plenary jurisdiction is governed by Section 23(b) of the Bankruptcy Act, 11 U.S.C. §46(b). That Section requires that a plenary action be filed in a Federal District Court where an independent basis of federal jurisdiction exists, *unless the Defendant consents to jurisdiction.*" *Rubin v. Virgin Islands Refinery Corporation (In Re Co-Build Companies, Inc.)*, 408 F.Supp. 717, 720 (E.D. Penn. 1976) (emphasis supplied).

In *Hastings v. H.M. Byllesby & Co. (In re Standard Gas & Electric Co.)*, 119 F.2d 658, 660 (3rd Cir. 1941), the Third Circuit Court of Appeals ruled that jurisdiction could not be based upon consent under Section 23(b) only because the Defendants had *not* consented to be sued in that jurisdiction. Examination of a similar case led the Sixth Circuit Court to conclude, "The record here satisfies us . . . that the minimum requirements of a preliminary inquiry by the Referee were not met, particularly in view of . . . the timely challenge by Buildex to the jurisdiction of the bankruptcy court." *Willyerd v. Buildex Company*, 463 F.2d 996, 999 (1972).

The cases cited by the Court of Appeals do not support its decision—all may be distinguished because the Defendants therein all objected immediately to the Bankruptcy Court's exercise of summary jurisdiction. Not one of the cases cited by the Court of Appeals involved a Court which declared sua sponte that summary jurisdiction did not exist. Not one denied the Bankruptcy Court summary jurisdiction

where a Defendant had consented to it. It is therefore evident that the judgment of the Court of Appeals directly contradicts the great weight of authority, and it must be reversed.

III. Bor-Son's Activities Constituted a Valid Waiver of Objection to the Bankruptcy Court's Exercise of Summary Jurisdiction.

A. As a general rule, new defenses to an action are not considered on appeal.

Defenses not raised are irrevocably waived. FED. R. CIV. P. 12(G). Therefore, as a general practice, appellate courts will not pass upon questions which were not presented at trial. *Bachman v. McCluer*, 63 F.2d 580, 583 (8th Cir. 1933). "It is elementary that we should not rule upon a point of law not presented to the trial judge. A trial judge ordinarily should not be charged with error in not deciding correctly a question that he was never asked to decide." *Skogen v. Dow Chemical Company*, 375 F.2d 692, 703 (8th Cir. 1967). In *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114, 117 (8th Cir. 1972), the Eighth Circuit Court of Appeals indicated that it would refuse to consider a question which was not presented to, or passed upon by, the trial court.

In the case at bar, Bor-Son voluntarily appeared before the trial court and litigated the merits of its claim. The jurisdiction of the Bankruptcy Court to hear the matter was not made an issue. Furthermore, neither party objected to the Bankruptcy Court's jurisdiction during the appeals to the District Court and to the Court of Appeals. Despite this, the Court of Appeals ruled that the Bankruptcy Court had no jurisdiction over the case. The ruling of the Court of Appeals

is inconsistent with the general rule that appellate courts will not address new, untried issues, and it must be vacated.

B. Under the Bankruptcy Act, any objection to a bankruptcy court's summary jurisdiction is waived if not raised at trial.

Bankruptcy Rule 2a(7) states that " . . . where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy . . . he shall be deemed to have consented to such jurisdiction." Moreover, Rule 915(a) emphasizes that, "Except as provided in Rule 112 and subject to Rule 928,[1] a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served." It is undisputed that Bor-Son did not object to the Bankruptcy Court's summary jurisdiction at any time. Therefore, the Bankruptcy Court properly exercised its jurisdiction over the case.

The Courts have consistently held that by failing to object to the Bankruptcy Court's summary proceedings, a party waives his privilege to a plenary proceeding. *Katchen v. Landy*, 382 U.S. 323, 335, 86 S.Ct. 467, 15 L. Ed. 2d 391 (1966); *First State Bank of Crook, Colorado v. Fox*, 10 F.2d 116, 118 (8th Cir. 1925); *Coffman v. Cobra Manufacturing Company*, 214 F.2d 489, 491 (9th Cir. 1954). Any objection to jurisdiction must be explicit. *Honeyman v. Hughes*, 150 F.2d 27, 29 (9th Cir. 1946). The objection must be made either in or before the answer, *Guardian Title Company v. Sulmeyer*,

[1] Rules 112 and 928 deal with subject matter jurisdiction, which has been discussed in Part I of the Petitioner's Statement of the Case.

417 F.2d 1290 (9th Cir. 1969), and an objection on appeal is too late. *Hutcherson v. Jeffrey (In re Hutcherson)*, 133 F.2d 959 (7th Cir. 1943). A claimant must not be permitted to speculate on the outcome of a proceeding, and then, if he loses the decision, for the first time protest the procedure. *Honeyman v. Hughes*, 150 F.2d 27, 29 (9th Cir. 1946).

Bor-Son did not object at any time to the jurisdiction of the Bankruptcy Court. No objection was made to the jurisdiction in Bor-Son's answer, or any of its pleadings. The trial court record does not contain any objection to the summary jurisdiction of the Bankruptcy Court. No mention of jurisdiction is made in the briefs submitted by the parties to the Bankruptcy Court, to the District Court, or to the Court of Appeals. In effect, the Court of Appeals' decision was a "windfall" to Bor-Son, allowing the claimant to speculate on the outcome of its proceeding, only to have the Court of Appeals unexpectedly overturn the case on procedural grounds. The decision of the Court of Appeals is contrary to the great weight of law, both statutory and judicial, and must be vacated.

C. A party which files a claim in a bankruptcy proceeding consents to the summary jurisdiction of the Bankruptcy Court.

Just as the parties' failure to object confers summary jurisdiction on the Bankruptcy Court, a claimant which files its claim in a bankruptcy proceeding also invokes the summary jurisdiction of the Bankruptcy Court. *United States v. Luther*, 225 F.2d 499, 505 (10th Cir. 1955). By so presenting its claims, a claimant subjects itself to all consequences that attach to an appearance. *Katchen v. Landy*, 382 U.S. 323, 328, 86 S.Ct. 462, 472, 15 L. Ed. 2d 391, 396.

Bor-Son presented its claim of $66,184.12 to the Bankruptcy Court, then failed to object to summary jurisdiction when its claim was consolidated with the action brought by Fiberglass. Bor-Son's actions constituted consent to the Bankruptcy Court's jurisdiction to adjudicate the entire case, and the decision of the Court of Appeals denying the Bankruptcy Court's jurisdiction must be vacated.

CONCLUSION

The United States Court of Appeals for the Eighth Circuit erred when it ruled that the Bankruptcy Court did not have summary jurisdiction over the case at bar. Summary jurisdiction did exist. Bor-Son consented to summary jurisdiction both by failing to object to jurisdiction and by filing its claim against Fiberglass in Bankruptcy Court. Therefore, the decision of the Eighth Circuit Court of Appeals should be vacated, and the decision of the District Court in favor of Fiberglass Specialty Company, Inc. should be re-instated.

Dated this 23rd day of September, 1982.

Respectfully submitted,

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